72-1455

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Supreme Court, U.S.
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in the

Supreme Court

of the United States

NO. 72-1455

RAUL CIRILO FERNANDEZ, [redacted] LUCRECIA LUM, ANNA ECHAVARRY, [redacted]

Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

PETITION FOR RAUL FERNANDEZ, LUCRECIA LUM, AND ANNA ECHAVARRY.

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in the
Supreme Court
of the United States

NO.

PEDRO LUIS RODRIGUEZ Y PAZ, RAUL CIRILO FERNANDEZ, FERNANDO ACOSTA, LUCRECIA LUM, ANNA ECHAVARRY, DULCE ESPINOSA, CLARENCE JACKSON, CARLOS INCHAUSTEGUI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR RAUL FERNANDEZ, LUCRECIA LUM, AND ANNA ECHAVARRY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioners RAUL FERNANDEZ, LUCRECIA LUM, and ANNA ECHAVARRY, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the Fifth Circuit, entered in these proceedings on June 29th, 1972 is reporter in 462 F. 2d 740. A copy is attached as Appendix "A".

The second opinion and Judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 12th, 1973, and is unreported. A copy is attached as Appendix "B".

An Order of the same Court denying a Petition for Rehearing and a Petition for Rehearing En Banc was entered on March 26th, 1973. A copy is attached as Appendix "C".

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

I.

WHETHER PETITIONERS FERNANDEZ, LUM AND ECHAVARRY SHOULD HAVE BEEN GRANTED A MISTRIAL WHEN IT WAS DISCOVERED THE PRESENCE OF TWO BOOKS IN THE JURY ROOM RELATING TO THE EVILS OF NARCOTICS WHICH HAD NOT BEEN INTRODUCED INTO EVIDENCE?

II.

WHETHER PETITIONERS FERNANDEZ, LUM AND ECHAVARRY WERE DENIED A FAIR TRIAL WHEN TWO EXHIBITS OF HEROIN WERE ADMITTED INTO EVIDENCE AND EXHIBITED TO THE JURY WITHOUT PROPER PREDICATE?

III.

A)

WHETHER THE PETITIONERS FERNANDEZ, LUM AND ECHAVARRY WERE DENIED A FAIR AND IMPARTIAL TRIAL WHEN COCAINE THAT A WOMAN BROUGHT FROM NICARAGUA WAS ADMITTED INTO EVIDENCE WITHOUT ANY EVIDENCE AS TO THIS WOMAN BEING A CO-CONSPIRATOR?

B)

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUBSTAIN A GUILTY VERDICT AGAINST THE PETITIONERS?

IV.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION AS TO COUNT I OF THE INDICTMENT?

V.

WHETHER OR NOT DEFENDANTS WERE ENTITLED TO EXAMINE THE GRAND JURY TESTIMONY OF PRINCIPAL GOVERNMENT WITNESSES AND WHO CONTRADICTED THEMSELVES AT TIME OF TRIAL?

STATEMENT OF THE FACTS

Petitioners Fernandez, Lum and Echavarry, will be referred to as "Petitioners" and the Transcript of the trial proceedings as "T".

Petitioners Fernandez, Lum and Echavarry adopt by reference the arguments, points and cases cited by each co-defendant, insofar as the same are applicable.

On October 14th, 1969, Petitioners Fernandez, Lum and Echavarry, together with ten additional Petitioners were indicted in Count I, of an indictment for a conspiracy to import narcotic drugs into the United States and to receive, buy, sell and facilitate their transportation to various parts of the United States after such importation.

Count II, charged Petitioners Fernandez and Echavarry and five additional Petitioners with the substantive act of receiving and facilitating the transportation of six pounds ten ounces of Cocaine on September 27th, 1968.

Nine Defendants went to trial, one of which was discharged on a judgement of acquittal at the close of the Government's case.

The Petitioners were tried by a jury beginning on June 1st, 1970, and terminating on June 23rd, 1970.

(T-4130) Petitioner Fernandez was found guilty as to both counts and sentenced to terms of fifteen years of confinement on each count both terms to run concurrently (T-4137). Petitioner Echavarry was found guilty

as to both counts and sentenced to a term of five years, of confinement on each count, both terms to run concurrently, (T-4141).

Petitioner Lum, was found guilty as to count I, and sentenced to a term of five years of confinement, (T-4163).

II. — TESTIMONY and EVIDENCE:

Luis Gomez, an alleged co-conspirator and felon (T-2340), sentenced to life imprisonment for the rape and robbery of Petitioner Lucrecia Lum (T-2381), and who used narcotics (T-2381), testified to the effect that during the month of July, 1968, he met Petitioner Fernandez, in New York City and was present when Petitioner Fernandez and a man by the name of Torrado and himself made a sale of heroin in New York, to a man by the name of Skipper Vega. (T-2273-2281).

He also testified to how Fernandez told him about a French man who facilitated Fernandez the heroin, (T-2282).

Further Gomez testified that on or about the 17th day of July, 1968 he was presently there when Petitioner Fernandez together with two other persons Torrado and Baulien delivered to one Johnnie Angelette two kilos of cocaine.

Gomez further testified about a trip he took to Detroit, Michigan, on the 14th day of July, 1968 for the purpose of carrrying out a sale of heroin and cocaine to a man by the name of Mookey, and how he was present

when such sales were made in the presence of Petitioner Lum, and his son "Mike", (T-2310) and of how Petitioner Lum was or did bring the moneys of such sales back to Miami, Florida (T-2317).

Gloria Richards a witness on behalf of the Government, told the Court and Jury, that she made a trip to Lima, Peru, in November of 1967, with Petitioner Echavarry in order to bring cocaine back to Miami, but that in that instance they could not bring the cocaine because the people in Peru had been busted, (T-1715-1717). She also testified that on January of 1968, she made a second trip together with Anna Echavarry this time to Managua, Nicaragua, from where they went to Quayaquil, Ecuador, to pick up the cocaine, (T-1726) which she and Petitioner Echavarry in fact did pick up, and brought to Miami, strapped to their bodies. These narcotics were never seized by any government agent not even introduced as evidence, (T-1733-34-36).

Oscar Estrada an alleged co-conspirator, prison inmate (T-1892), and a narcotics dealer (T-1898) against whom additional felony charges were pending took the stand on behalf of the Government. His testimony was that around March, 1968, he came to Miami, Florida, from New York, together with a co-conspirator by the name of Torrado (T-1916) for the purpose of arranging with Petitioner Fernandez a supply of narcotics for Torrado in New York. He also testified that him and Torrado met with Petitioner Fernandez and co-defendant Acosta at a restaurant in Hialeah, Florida, where a narcotics transaction allegedley took place. (T-1916-1935). He also offered testimony to the effect that Petitioner Lum was present

at a narcotics action that took place in New York City on or about April 1968, where she counted the money paid for the narcotics. (T-2018).

ARGUMENT

POINT I

WHETHER PETITIONER FERNANDEZ, LUM AND ECHAVARRY SHOULD HAVE BEEN GRANTED A MISTRIAL WHEN IT WAS DISCOVERED THE PRESENCE OF TWO BOOKS IN THE JURY ROOM RELATING TO THE EVILS OF NARCOTICS WHICH HAD NOT BEEN INTRODUCED INTO EVIDENCE?

Before the end of the trial it was discovered by counsel that there were two books in the jury room, both books dealing with the problems and evil effects that narcotic drugs bring upon those members of society that unfortunately become addicted to them. The Title of the books in question are as follows:

A) "Merchants of Misery" by J.A. Buckwater and

B) "Uptight" by: John Jiminez

As told to Charles Meredith, the books had been checked out from a library in Fort Lauderdale, Florida, by one of the jurors.

Petitioners Fernandez, Lum and Echavarry submit to this Honorable Court that this constitutes reversible error on the following grounds:

A) The books in question dealt with narcotics in a derogatory manner and were capable of influencing and

prejudicing the jury against the Petitioners in a narcotics case.

B) It is well settled principle at law that the jurors must not receive outside information concerning the case before them during trial. *(Re Collins 15 A 2d 98, N.J. 1940)* and they may not receive any evidence other than that properly presented and admitted at the trial, not even a dictionary, *(Palestroni U.S. Jacobs 77 A 2d 1830 N.J. 1950; Smith vs. State as So. 2d 525)*, since the constitutional requirements demand that the evidence that goes to the jury shall be only that properly presented in open Court where the Petitioner is afforded the right of objection and cross-examination.

In the case at hand, a Motion was properly made for a mistrial and the Court denied said Motion, (T-3733).

Therefore, Petitioners submit to this Court, that it was error of the trial Court not to grant Petitioners Motion for a Mistrial.

POINT II

WHETHER PETITIONERS FERNANDEZ, LUM AND ECHAVARRY WERE DENIED A FAIR TRIAL WHEN TWO EXHIBITS OF HEROIN WERE ADMITTED INTO EVIDENCE AND EXHIBITED TO THE JURY WITHOUT PROPER PREDICATE?

Government's Exhibit No. 1 and 2 were received into evidence (T 436-461) over objections. Both exhibits

were packages of heroin and were received upon the testimony and identification of narcotic agent Gruden, who had one of the co-defendants under surveillance and had instructed agent Collins to attempt an undercover agent purchase of drugs from said co-defendants. (T-426-430). Both exhibits were the result of the alleged undercover purchase by agent Collins from this co-defendant.

In spite of the fact that in neither occasion agent Gruden was present at the actual moment of the transaction (T429 and 454), and did not see money nor contraband passing from agent Collins, to the co-defendant, and over objections (T461) the narcotics were admitted into evidence.

However, these two undercover purchases were in no way connected to the charges of conspiracy against these defendants. Here we are talking about sales that took place in May, 1966 (T-432), and the indictment charges that the alleged importation of narcotics by the co-conspirators commenced in November 1967. Furthermore, there was no evidence to the rest of the co-conspirator which was the correct predicate, that should have been established and therefore, this evidence did not tend to show a common scheme, plan or design, and was inadmissible into evidence.

Wherefore, Petitioners respectfully seek reversal of the judgment and sentence by reason that their rights to a fair and impartial trial were denied when exhibits of heroin totally unconnected with this cause, were shown to the jury, definitely impressing upon the minds of the jurors as a guilt of defendants.

POINT III

A) WHETHER THE PETITIONERS FERNANDEZ, LUM AND ECHAVARRY WERE DENIED A FAIR AND IMPARTIAL TRIAL WHEN COCAINE THAT A WOMAN BROUGHT FROM NICARAGUA WAS ADMITTED INTO EVIDENCE WITHOUT ANY EVIDENCE AS TO THIS WOMAN BEING A CO-CONSPIRATOR?

B) WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A GUILTY VERDICT AGAINST THE PETITIONERS?

On September 1968, over six pounds of cocaine were confiscated from a woman named Denise Betancourt by custom agents at the Miami International Airport and she was arrested. She had brought the cocaine into the United States from Nicaragua, (T-2536).

This cocaine was marked as Government's Exhibit No. 30, and constituted the only exhibit of cocaine at the trial and the only evidence with regard to Count II, of the Indictment.

At no time during the three weeks that the trial lasted did the Government produce any evidence whatsoever which tended to link this cocaine to the Defendants.

The Government called this woman to the stand in order to connect this contraband to these Defendants, more specifically to one of the alleged co-conspirators,

(T-2472), however, the witness refused to testify and took the 5th Amendment, (T-2859) and the Government knew it at least a week before.

Nonetheless, the Government sought the admission of the contraband into evidence as Exhibit 30, and afterward was unable to connect this evidence to any of these Defendants or any other co-conspirator. The Court nevertheless, denied timely motions to strike, the exhibits and a motion for mistrial.

Wherefore, by reason of the foregoing these Petitioners submit to this Honorable Court that prejudicial error resulted in permitting to have exhibited to the jury and admitted into evidence the cocaine as Government's Exhibit No. 30, and secondly that in any event this evidence was not enough as a matter of law to sustain a conviction against these Petitioners; and the judgment should be reversed.

POINT IV

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION AS TO COUNT I OF THE INDICTMENT?

Count I charges these Petitioners with a conspiracy to import narcotic drugs into the United States to conceal, buy sell and facilitate in its transportation to various parts of the United States after the said narcotic drugs had been imported.

All the evidence and testimony produced at trial, was with regards to the importation of the narcotic drug

cocaine. In this the Government called to the stand a series of witnesses, all young ladies (T-971-1869), who testified to how they were recruited to bring cocaine from Managua, Nicaragua. However, absolutely none of the witnesses mentioned the names of the Petitioners Fernandez or Lum, nor were familiar with their names nor knew them.

As set out by the case of *United States vs. Falcone 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128, 1940,* the elements of a conspiracy are an agreement by two o more persons to combine efforts for an illegal purpos and an overt act by one of the members of the furtherance of the agreement.

Both elements have to be proven in order to sustai a conviction under a conspiracy charge and is estab lished that without one of them the conviction ca stand.

It is admitted that evidence related to the declara tion or acts of any one of the alleged co-conspirato made in furtherance of the objects of the conspirac during its existence, are admissible against all th members of the conspiracy. *(Logan v. U.S. 144 U.S 263, 12 S.Ct. 617, 36 L. Ed. 429).*

However, it is established that independent illeg acts by a number of persons do not themselves pro the existence of a conspiracy among them, the agre ment to commit the illegal acts following an agree criminal and illegal design must be proven indepe dently of the alleged overt acts.

In the case at hand the Government failed

produce sufficient and substantial evidence as to the first element of the conspiracy:

The agreement to combine for effort for an illegal purpose between any two of the co-defendants, the illegal purpose being of course the illegal importation of narcotic drugs into the United States.

There is no evidence at all that connects the co-defendants among themselves, and this is fatal to the case of the Government since the charge here is as to all of the co-defendants in a single conspiracy.

That we have continuously throughout this case an endless line of hearsay testimony that at the most tend to prove the existence of several different conspiracies.

This hearsay testimony was objected to continuously by counsel and on each occasion was denied by the Court.

As to Petitioners Fernandez, Lum and Echavarry the Government sought to prove their connections to "The Conspiracy", by hearsay statement and declarations of persons named or charged as co-conspirators, such as the convicted felons of Gomez, and Oscar Estrada and the drug addict Gloria Richards. These alleged co-conspirators, such as the convicted above named, presented uncorroborated declarations in Court as to their participation in the conspiracy but there is no evidence to the effect that in fact they were co-conspirators.

There was no evidence nor testimony at all which independently of the testimony of the named and

charged co-conspirators such as Gomez, Estrada and Richards tended to prove that in fact a conspiracy existed. Nor was there any evidence that tended to prove that these Government's witnesses were co-conspirators other than their own admissions and declarations.

This testimony of these witnesses should have not been admitted into evidence since it was hearsay and there was no independent evidence as to their actual status as co-conspirators. *United States v. U.S. Gypsum Co., 333 U.S. 364, 68 S. Ct. 525 (1948) Reh. den. 333 U.S. 869 Ct., Glasser v. United States 315 U.S. 60, 623 Ct. 457, 86 L. Ed. 680, 1942), Landus vs. United States 304 Fed. 577, (5th Cir. 1962).*

As far as the second element in a conspiracy charge the Government did not connect in its testimony or evidence the alleged acts of the Defendants to the conspiracy. For example, the alleged participation in the sales of heroin by both Petitioners Fernandez and Lum in New York and Detroit was not connected by Government the specific cocaine that allegedly was imported by these Petitioners. It is respectfully submitted to this Court, that the Government had as a matter of law the burden of proving that such sales of narcotics were in effect sales of the very same narcotics that the Government claimed were illegally imported into the United States, by the Defendants and were infurtherance of the conspiracy. This the Government failed to do.

WHEREFORE, it is respectfully submitted that the Trial Court erred in denying Petitioners motion for acquittal at the end of the Government's case, since as

a matter of law the Government failed to the elements of the offense. That the trial court was in error in admitting the hearsay testimony of witnesses Gomez, Estrada and Richards and that such testimony was prejudicial to the Petitioners. Therefore, the verdict and sentence should be reversed.

POINT V

WHETHER OR NOT DEFENDANTS WERE ENTITLED TO EXAMINE THE GRAND JURY TESTIMONY OF PRINCIPAL GOVERNMENT WITNESSES WHO CONTRADICTED THEMSELVES AT TIME OF TRIAL?

On several occasions during the trial counsel at the conclusion of the direct examination of the principal Government witness moved the Court for the Grand Jury testimony of the witnesses, and which motions the Court denied altogether. (T-311-411, 918, 1355, 1706, 1982, 2112, 2355, 2372).

The motions for the Grand Jury testimony were made on the following grounds:

A) All of the principal Government witnesses were either convicted felons or narcotics addicts, users and pushers or both.

B) One of them was serving a life sentence on what he claims to be a "frame up" by a co-defendant.

C) The other was serving in New York for a first

degree murder arising out of a narcotics deal in which he was involved together with a co-defendant.

D) The other admitted that she had perjured earlier in the day.

E) Most important of all yet is the fact that all these witnesses contradicted themselves and gave inconsistent testimony.

However, as stated before the Court in every instance denied the motions. This we submit to be reversible error since it deprived the Petitioner's Fernandez, Lum, and Echavarry, of their rights to a fair trial.

The law as to making available to defense counsel, at trial the grand jury testimony of the Government witnesses after these witnesses had taken the stand in open court is best stated in the case of *Dennis v. United States, 384 U.S. 855, 16 L. Ed. 2d 973, 86 S. Ct. 1840 (1966).*

Before the Dennis decision it had been held in almost if not all the circuits that a "particularized need" for these testimonies had to be shown to the Court in order to be allowed to see the grand jury testimony. *Pittsburg Plate Glass Co. vs. United States 360, U.S. 395, L. Ed. 1323, 79 S. Ct. 1237.*

This "particularized need" arose in instances where there had been inconsistent and contradictory testimony by a witness, and this grand jury testimony can be used at the trial to impeach a witness, to refresh

his recollections or to test his credibility. *Dennis vs. U.S.* Supra.

Before to the Dennis decision the reason for not allowing the grand jury testimony of the Government witness to be disclosed to defense attorneys at trial were set out in *Simmons vs. United States, 308, 2d 324 (D.C. 1962)* as follows:

"We note at the outset that an in camera inspection by the trial court, does not breach the secrecy of grand jury proceedings. The original testimony is not made available to the defense unless and until that inspection reveals inconsistencies". Four reasons are generally advanced for keeping grand jury minutes secret:

1. - To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him.

2. - To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted.

3. - To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation.

4. - To encourage the grand jurors to engage in uninhibited investigations and deliberation by barring disclosure of their votes and comments during the proceedings. None of these policies is jeopardized where, as here, the defense seeks only the inconsistent

testimony of a witness who has appeared in open Court and not the entire record of the grand jury proceedings.

We conclude that a defense request for an in camera inspection should be granted whenever it appears that the testimony of an important prosecution witness at trial may be inconsistent with his prior testimony before the grand jury; and, if such inspection reveals inconsistencies affecting credibility, his grand jury testimony should be made available to the defense.

In Dennis however, the Supreme Court held that "particularized need" needed no longer to be shown and that, as interpreted in subsequent cases, in any event the use of grand jury testimony by defense counsel to impeach, refresh the recollections to test the credibility of a witness make it in itself a case of "particularized need". *United States v. Bowman, 283 F. Supp. 636 (D.C. 1968); Melton v. United States, 398 F. 2d 365 (2d Cir. 1967); United States v. Amabile 395 F. 2d 47 (7th Cir. 1967); Niro vs. United States 388 F. 2d 535 (1st Cir) (1968).*

This Circuit has indicated in cases subsequent to Dennis that it has not abandoned the "particularized need" test. *Stassis v. United States, 401 F. 2d 259 (5th Cir. 1968); United States vs. Barson,_____ F 2d_____, 8 Cir. L 2129 (5th Cir. 1970).* However, this Court in its decision has indicated that in a case where there was no further need for secrecy, disclosure of grand jury minutes should have been available to the defense.

United States v. Barson, In the Barson case the Court states that:

If the grand jury testimony is inconsistent with the testimony given at trail, then fair play seems to dictate that the defendants be allowed use of the grand jury minutes for secrecy to protect individuals or in the aid of national security.

Here the appellant seeks only the witnesses grand jury testimony pertaining to the subjects testified to at trial.

In the case at hand if we take into consideration the above mentioned facts about the character of the witness, their involvement in the narcotics field and their contradicted and inconsistent testimony and having all of them testify in open court, eliminating thus any and all need for further secrecy, these Petitioners respectfully submit to this Honorable Court, that the trial court erred in denying Petitioner's motion for a disclosure of the witnesses, grand jury testimony which resulted in reversible and prejudicial error to the Petitioners wherefore the judgment and sentence should be resersed.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

Dated at Miami, Florida, this_____day of April, 1973.

Respectively submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing Petition for Writ of Certiorari was mailed this_____day of April, 1973 to Hon. Erwin Griswald, U.S. Solicitor General, U.S. Dept. of Justice, Wash. 25, D.C.; Hoffman and St. Jean, Attorneys at Law, 407 Lincoln Road, Miami Beach, Florida; James E. Siff, Esq., 401 Broadway, New York, N. Y.; William A. Daniel, Esq., 408 Concord Building, Miami, Florida; Max B. Kogen, Esq., City National Bank Building, Miami, Florida; and Angelo Ali, Esq., 28 West Flagler Street, Miami, Florida.

GINO P. NEGRETTI

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28997

PEDRO LUIS RODRIGUEZ Y PAZ, RAUL CIRILO FERNANDEZ, FERNANDO ACOSTA, LUCRECIA LUM, ANNA ECHAVARRY, DULCE ESPINOSA, CLARENCE JACKSON and CARLOS INCHAUSTEGUI,

Defendants-Appellants,

versus

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(June 29, 1972)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

GODBOLD, Circuit Judge. There were 13 defendants and 23 additional named co-conspirators in this complex and lengthy narcotics case, which concerns drug traffic activities in Miami, New York, Detroit,

Nicaragua, South American countries, and elsewhere, and involving dozens of persons. Four defendants fled and were not tried. In a lengthy trial in Miami, Florida, ending June 23, 1970, one defendant was acquitted. The remaining eight — Paz, Raul Fernandez, Acosta, Lum, Echavarry, Espinosa, Jackson and Inchaustegui — were convicted under Count I, conspiracy to import heroin and cocaine.[1] Five of them — Paz, Acosta, Raul Fernandez, Echavarry and Inchaustegui — were convicted under Count II, transportation and concealment of cocaine.[2] All eight appeal.

We reverse the conviction under Count Two. As to several issues, we affirm. And we remand for an evidentiary hearing on the issue of the presence in the jury room of non-evidentiary material relating to drugs and drug traffic.

The government's evidence tended to show a conspiracy of the following general nature. The original actors were defendants Paz, Acosta and Raul Fernandez, who were associated together in drug activities in the New York area. Subsequently Paz and his wife, defendant Dulce Espinosa, went to the Central American city of Managua, Nicaragua, which became their base of operations, while Raul Fernandez and Acosta began to operate principally out of Miami. Illegal shipments of drugs were brought into Miami from Managua and South American points, but principally from Managua, by young American women couriers who entered Miami with parcels of drugs

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[1] In violation of 21 U.S.C. §173 and 174.

[2] In violation of 21 U.S.C. §174.

strapped to their bodies. The usual payment to the courier was $1,000. The couriers also transported between Miami and Managua letters, funds, lactose (for "cutting" drugs) and even merchandise destined as gifts for Nicaraguan officials. Many of these young couriers were named as co-conspirators but not defendants. Defendant Anna Echavarry accompanied couriers on numerous flights between Miami and Central and South America and assisted in arrangements at these foreign points of origin.

The couriers were recruited by co-conspirator Frank Cocossa, assisted by co-conspirator Gloria Richards. Also Cocossa made several trips between Miami and Managua, where he met Paz a number of times, and he assisted in moving at least one shipment of drugs to New York. Cocossa had been brought into the operation by defendant Inchaustegui, whose activities were chiefly in Miami but who was at times in Managua. Inchaustegui also supplied expense money to couriers, received incoming shipments, and supplied lactose.

Defendants Acosta and Raul Fernandez were active at the Miami end. They supplied drugs to a New York group which included a number of co-conspirators and defendant Lucrecia Lum. Lum also transported, sold and guarded drugs. Defendant Jackson was a purchaser of the ring's drugs, based in the Detroit area. Also he assisted in transportation of drugs. Defendant Raul Fernandez was from time to time engaged in collecting monies due from purchasers.

Facets of the conspiracy were described in detail by several couriers, the recruiters Cocossa and Gloria

Richards, two members of the New York group, and several government agents.

1.

There is no merit to the contention that there were multiple conspiracies rather than one. This is a question for the trier of the facts, Koolish v. U.S., 340 F.2d 513 (8th Cir.), cert. denied, 381 U.S. 951, 14 L.Ed. 2d 724 (1965), and it is quite clear that there was sufficient evidence on which to submit it to the jury.

2.

The trial court erred in denying the timely motions of the Count Two defendants for judgment of acquittal on that count, which was the substantive count. Count Two charged that seven named defendants "did fraudulently, knowingly and wilfully receive, conceal and facilitate the transportation and concealment" of approximately six pounds, 10 ounces of cocaine on or about September 27, 1968, at Miami, in violation of 21 U.S.C. §174. Five of the defendants were among those already described — Paz, Acosta, Raul Fernandez, Echavarry, and Inchaustegui. The other two were Norberto Fernandez, whose motion of judgment for acquittal was granted, and Mario Marrero, who fled and was not tried but was described in testimony as a participant in the conspiracy.

Evidence concerning this particular charge was that on September 27, 1968, a government agent, acting on information the contents of which were unrevealed,

put under surveillance deplaning passengers coming into the customs enclosure of the Miami airport. He observed a female passenger, Denise Bethancourt, who had arrived on a Lanica Airline flight from Managua, Nicaragua. He noted that she was bulky around the hips. The agent intercepted her after she had made her customs declaration and had completed a customs inspection. She was searched by female inspectors, who found taped to her body, underneath a girdle, six plastic bags of cocaine. Miss Bethancourt was wearing an "A-line" dress, a loose fitting dress that hangs from the shoulders and does not have a tight or fitted waist.

Prior to the arrival of the Lanica flight the agent checked the area outside of the customs enclosure at which vehicles park to pick up passengers and luggage, and noted a gold Buick Riviera and took its license number. Approximately two weeks before, while surveilling the Miami airport, the agent had observed the same Buick just prior to the arrival of the Lanica flight from Managua, Nicaragua, Also, in September, prior to September 27, the agent had observed the same automobile parked at the residence of Marrero in Hialeah, near Miami. There was ample testimony of Marrero's part in the conspiracy. After taking the license number on September 27, the agent had it checked and found that the car was registered in the name of Gilbert Roque at a Miami address which was shown to be the residence of defendant Acosta, a central figure in the conspiracy. Miss Bethancourt was not seen in or about the Buick at the airport or elsewhere. Her ticket stub showed that she had departed Miami on September 22, 1968.

At trial Miss Bethancourt claimed the privilege against self-incrimination and did not testify. There was no testimony by any of the other couriers, or the recruiters of couriers, or by anyone else, identifying her as a courier for this ring, or as even being in contact with or in the presence of any defendant or co-conspirator, nor was the cocaine which she brought in connected by direct evidence to the conspiracy. In fact her name was mentioned in the testimony with respect to only this single incident at the Miami airport.[3]

To sum up, the evidence on the substantive count was this:

(1) Of a conspiracy, a facet of which was to import cocaine into Miami from Managua, Nicaragua, with testimony tending to show participation therein by each of the convicted Count Two defendants at either the Miami or the Managua end, or both;

(2) Of numerous shipments of cocaine made from Managua to Miami pursuant to the conspiracy and over a period of approximately a year, including September 1968;

(3) Of a modus operandi of shipment the same as the employed by Miss Bethancourt;

(4) Of the presence, in the vicinity of the customs area, of a gold Buick which had been seen earlier at the residence of a participant in the conspiracy and which was registered at the address of a central participant

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[3] Except for one other reference, which was stricken from evidence.

but in another name, and which had been observed at the airport prior to arrival of another filght from Managua.

This is not enough circumstantial evidence on which to convict. A jury could not reasonably conclude that the evidence excluded every reasonable hypothesis but that of guilt. Surrett v. U.S. 421 F.2d 403 (5th Cir. 1970); Harper v. U.S., 405 F.2d 185 (5th Cir. 1969). The possibility cannot reasonably be excluded that Miss Bethancourt was acting solely on her own behalf and had no connection with this ring, nor that she was acting as part of another group. There is a suspicion that the Buick was at the airport to meet her, but it is no more than suspicion. The reason for its presence may have been innocent, and, if it was there as part of the conspiracy, the purpose of its presence was not necessarily connected with the arrival of Miss Bethancourt.

Meyers v. U.S., 310 F.2d 801 (5th Cir. 1962), relied upon by the government; is no help to it. In that case the courier attempted to bring across an international bridge marijuana concealed in an automobile door. The codefendant was her husband. He was seen on the bridge less than two hours after his wife was stopped. In his possession was a cologne bottle, and the odor from it was similar to that of the heavily perfumed car driven by his wife. The marijuana was concealed in a position difficult to reach, and the inspector who retrieved it suffered scratches on his arm. Defendant, when arrested, had similar scratches on his arm, and carrying a pair of gloves. No such nexus between courier and any defendant has been established in the present case.

The case must be remanded for a limited post-trial hearing because of the presence in the jury room during the trial of two books, concerning drug traffic, drug problems, and people involved in drugs, that were not in evidence. The books were "Merchants of Misery," by J. A. Buckwalter, published by Pacific Press Publishing Association, Mountain View, Calif., and "Up Tight," by John Gimenez as told to Char Meredith, published by Word Books, Waco, Texas. "Merchants of Misery" was the more susceptible of influencing the juror. It concerns large-scale drug business carried on by criminal syndicates, which is the type of operation these defendants are claimed to have had.

The books were discovered on the seventeenth trial day, the last day of taking of testimony, when the trial judge and attorneys went into the jury room for the court to hear a legal argument out of the hearing of the jury. All defendants called the books to the attention of the court and moved for a mistrial, which was denied. The books were left in the jury room. A motion was made that they be obtained and the prefaces read into the record. The trial judge declined on the ground that to take the books away from the jury would only call attention to the problem. No inquiry was made of jurors to ascertain the extent, if any, that the books had been seen by members of the jury and discussed. Since no inquiry was ever made, the exact circumstances of the books being in the room were not established. The supposition is that one of the jurors brought them from a church library in Ft. Lauderdale, since the name of the library appears in at least one of the books. No corrective or cautionary instruction was given when the books were discovered and called to the court's attention or when the jury was charged. However, at the end

of the proceedings on the day of discovery the court instructed the jury not to read newspapers or listen to news broadcasts, and added this:

> Let me say one other thing. I hate to restrict you on your reading. However, until after this case is over, don't read anything, unless you get a letter from someone in your family. If you have to read any books or anything that might give you new and independent ideas about any of this matter, don't discuss it with each other.

Rather than being an instruction not to read extrinsic matter concerning the subject matter of the trial, this was subject to the interpretation that such reading was permissible so long as not discussed with other persons.

At the conclusion of the trial, after the verdict was rendered, the defendants requested the court to inquire of the jurors to determine who had checked out the books and the location of the library. The United States objected, and the court refused the request. The books before us are stipulated to be correct copies.

The defendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the books affected the verdict. Farese v. U.S., 428 F.2d 178 (5th Cir. 1970). In Farese the defendant was accused of interstate transportation of fraudulent security. There was put in evidence an attache case which had a clean shirt in it. While examining the attache case the jury found $750 in cash in the shirt. There had been no testimony concerning any such sum — the only nexus

was that the crime charged concerned monetary gain. This court, reversed, applying the test of whether it could be said there was no reasonable possibility that the extrinsic matter affected the verdict. In U.S. v. Staples, 445 F.2d 863 (5th Cir. 1971), cert. denied,____ U.S.____,____ L.Ed. 2d____ (1972), law books had been left in the jury room. The judge interrogated the jurors and found that only one had examined the books, and what he had seen was not relevant to the offense on trial. The test, therefore, was satisfied. Here, as in Farese, the extrinsic matter does not go directly to the offense charged but to the type of conduct and activities on trial. Stoehr v. U.S., 196 F.2d 276 (3d Cir.), cert. denied, 344 U.S. 826, 97 L.Ed. 643 (1952), is no help to the government. In a criminal income tax trial, the jury saw a movie about gangsters with remote references to income tax matters. The defense made no showing sufficient to place on the judge a duty to inquire. In his charge the court instructed the jury to disregard movies.

In framing relief which will give due regard to the rights of the government and of the defendants, we follow the procedure outlined by Judge Simpson in U.S. v. Barson, 434 F.2d 127, 131 (5th Cir. 1970). We remand to the District Court with directions to conduct an evidentiary hearing to determine whether there is or is not a reasonable possibility that the books affected the jury's verdict, Farese v. U.S., supra. Inquiry must be made into how the books reached the jury room; whether they were available to members of the jury and, if so, for how long; the extent, if any, to which they were seen, read, discussed and considered by members of the jury; and such other matters as may bear on the issue of the reasonable possiblity of whether they

affected the verdict.[4] The court shall make and certify to us findings of fact and conclusions of law together with a transcript of the hearing. Our determination of whether to affirm the judgments of conviction or to reverse and remand for new trial will follow such certification. Jurisdiction of the appeal is retained in this court during the limited remand for the purpose stated.

Upon conclusion of the direct examination of each of several government witnesses, various of the defendants moved for production of the respective witnesses' testimony given before the grand jury. In each instance the motion was denied. Some of the witnesses had read the transcript of their respective grand jury testimony in preparation for testifying at the trial. The ground asserted for production was defendants' claim that the testimony at trial was inconsistent within itself, inconsistent with other statements, and inconsistent with the indictment. On appeal the claimed inconsistencies are said by defendants to be of particular importance because at least some of the witnesses concerned were convicted felons, or narcotics addict, users and pushers, or both, and at least some were named as co-conspirators but not defendants.

Since Dennis v. U.S., 384 U.S. 855, 16 L.Ed. 2d 973 (1966), this circuit has continued to adhere to the rule that the defendant must make a showing of par-

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[4]Factors which go into cutting a Gordian knot of this kind are discussed in the dissenting opinion in U.S. v. McKinney, 429 F.2d 1019, 1031 (5th Cir. 1970), which opinion, on rehearing, became one of two opinions of the majority, U.S. v. McKinney, 434 F.2d 831 (5th Cir. 1970), cert. denied, 401 U.S. 922, 27 L.Ed. 2d 825 (1971).

ticularized need to be entitled to inspect grand jury minutes. U.S. v. Jenkins, 442 F.2d 429 (5th Cir. 1971); Barson v. U.S., 434 F.2d 127 (5th Cir. 1970); Posey v. U.S., 416 F.2d 545 (5thCir. 1969), cert. denied, 397 U.S. 946, 25 L.Ed. 2d 127 (1970); James v. U.S., 416 F.2d 467 (5th Cir. 1969), cert. denied, 397 U.S. 907, 25 L.Ed. 2d 87 (1970); White v. U.S., 415 F.2d 292 (5th Cir. 1969), cert. denied, 397 U.S. 993, 25 L.Ed. 2d 400 (1970); Stassi v. U.S., 401 F.2d 259 (5th Cir. 1968), vacated on other grounds sub nom. Giordano v. U.S., 394 U.S. 310, 22 L.Ed. 2d 297 (1969); Nolan v. U.S., 395 F.2d 283 (5th Cir. 1968); Menendez v. U.S., 393 F.2d 312 (5th Cir. 1968), cert. denied, 393 U.S. 1029, 21 L.Ed. 2d 572 (1969). Our position is contrary to the rule established in some other circuits which dispense with a required showing of a particularized need. See U.S. v. Amabile, 395 F.2d 47 (7th Cir. 1968), vacated on other grounds sub nom. Giordano v. U.S., 394 U.S. 310, 22 L.Ed. 2d 297 (1969); Allen v. U.S., 390 F.2d 476 (D.C. Cir. 1968); U.S. v. Youngblood, 379 F.2d 365 (2d Cir. 1967). Unlike several courts, see Cargill v. U.S., 381 F.2d 849 (10th Cir. 1967), cert. denied, 389 U.S. 1041, 10 L.Ed. 2d 831 (1968), Schlinsky v. U.S., 379 F.2d 735 (1st Cir.), cert. denied, 389 U.S. 920, 19 L.Ed. 2d 265 (1967), we have not read Dennis as equating an asserted need for grand jury minutes in order to impeach a government witness with the particularized need required for inspection. See Nolan v. U.S. supra; Menendez v. U.S., supra. While our decisions have stressed the need for maintaining the secrecy of grand jury proceedings, Nolan v. U.S., supra; Menendez v. U.S., supra, especially to prevent loss of testimony through fear of retaliation and to protect the independence of the grand jury, Posey v. U.S., supra, we have recognized, as we must, the need for lifting the veil of secrecy when there is an actual

discrepancy between a witness' grand jury and trial testimony. So that the grand jury's realm will be invaded no more than necessary we have approved as the initial step in response to motions for inspection an in camera inspection conducted by the district judge to discover any such inconsistencies. See Barson v. U.S., supra; James v. U.S., supra; Menendez v. U.S., supra. Disclosure of grand jury minutes is thus a matter committed to the sound discretion of the district judge for evaluation in light of the particularized need alleged. In reviewing the exercise of that discretion, keeping in mind the desire for a balance between the need for secrecy and fairness to the defendant in presenting his defense, we have deemed relevant the availability of Jencks Act material as an alternative source of statements impeaching the witness whose grand jury testimony is sought. See U.S. v. Barson, supra; James v. U.S., supra; Posey v. U.S., supra.

We conclude that the trial judge did not commit reversible error in denying defendants access to the minutes. In reaching that view we bear in mind that the only asserted particularized need was the desire to search for impeaching material for use in cross examination, that as to some of the witnesses the trial judge made an in camera inspection of the minutes and found no inconsistencies, and that as to at least some of the witnesses defendants were given Jencks Act material for use in cross examination. We have pointed out that the policy of protecting individuals who have given information to the grand jury with respect to commission of crime is a wise one, but that "once the individual has been called as a witness at trial and his testimony made public, this principle in the run of the mill case is of slight if any weight." Barson, supra, at

129. But this is not a routine case. The record is replete with evidence of organized crime and of misconduct of all sorts, and of far reaching and intricate criminal organization in many countries and in several parts of the United States, and some of the defendants were at large at the time of trial. As we pointed out in Barson, when there is a compelling need for secrecy to protect individuals even fair play does not demand that a defendant be allowed access to the grand jury minutes for impeachment purposes. We have considered the fact that in this instance, as in Barson, the trial judge examined testimony of some government witnesses in camera (and found no inconsistency) but, with no apparent reason for the distinction, declined to examine that of other government witnesses of no less importance. Nevertheless, because of the other factors we have enumerated, we are of the view that the present trial judge's allowable range of discretion was not exceeded.

If admission into evidence of the cocaine brought into the country by Denise Bethancourt[1] was error, as to the conspiracy count it was harmless beyond reasonable doubt. There had been day after day of testimony by witness after witness of the details of bringing in shipments of cocaine in the same manner, and of the financing of and arrangements for the shipments, and of distribution of cocaine thus brought in. It was not reversible error for the jury to see the seized fruits of a single shipment that was not sufficiently tied to the Count One defendants. Similarly, if it was error to admit into evidence two packages of heroin purportedly sold by Paz to an undercover agent — and the question

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[1] See part 2, supra.

is a close one — it was not reversible. This was only one item of an overwhelming mass of testimony relating to Paz's involvement as a central figure in the conspiracy.

The volunteered statement by a witness that he had come to Miami with two marshals and with defendant Paz handcuffed to him was not reversible error. In context it was little more prejudicial than a statement that Paz had been arrested. While Paz had not testified and thus had not put his character in issue, there was not, as in Odom v. U.S., 377 F.2d 853 (5th Cir. 1967), a plain reference to a prior offense committed by a defendant; indeed, it is unclear whether the reference related at all to a different offense.

There is no merit to the contention of Acosta that a display of photographs from which witness Gloria Richards selected a picture of co-conspirator Jesus Alvarez was impermissibly suggestive.

Other contentions raised by defendants either do not require, or do not deserve, comment.

AFFIRMED in part. All convictions under Count Two are REVERSED. The case is REMANDED for the limited purpose of an evidentiary hearing, and jurisdiction of the appeal is otherwise retained.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28997

PEDRO LUIS RODRIGUEZ Y PAZ, RAUL CIRILO FERNANDEZ, FERNANDO ACOSTA, LUCRECIA LUM, ANNA ECHAVARRY, DULCE ESPINOSA, CLARENCE JACKSON AND CARLOS INCHAUSTEGUI,

Defendants-Appellants,

versus

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(February 12, 1973)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

PER CURIAM: This narcotics case was remanded to the District Court for a limited post-trial hearing on the issue of whether there is or is not a reasonable possibility that the verdict of the jury was affected by

the presence in the jury room, on the last day of taking testimony, of two books that were not in evidence. The books concerned drug traffic, drug problems, and people involved in drugs. The factual circumstances requiring the remand order and the directions given to the District Court for an evidentiary hearing appear in our prior opinion, Paz v. U.S., 462 F.2d 740 (5th Cir. 1972).

The trial judge has conducted an evidentiary hearing as directed, the transcript thereof[1] and the trial judge's findings and conclusions have been certified to us, and the parties have filed briefs on the remand issue. In the hearing each juror and alternate was interrogated out of the presence of the other jurors. As each appeared the court interrogated him first and then gave counsel the opportunity to examine. Following the hearing the trial judge entered a lengthy order containing detailed findings of fact and conclusions of law.

The procedure followed by the trial judge and the standards employed by him complied with our remand directions. We find no error in the trial judge's conclusion that there is no reasonable possibility that the books — brought to the court by an alternate juror who did not participate in the jury's deliberations — affected the verdict.

The evidentiary hearing brought to light the possibility that a pamphlet, received by the same alternate juror (a dentist) in his professional capacity and listing the names of some drugs, may have been brought into the jury room. The District Court reached the conclusion that there was no reasonable possibility

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[1] More than 100 pages long.

that the pamphlet — if brought into the jury room at all — affected the verdit. We find no error in that conclusion.

The findings and conclusions of the District Court on remand are AFFIRMED. This requires that the convictions under Count I be, and they hereby are, AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28997

PEDRO LUIS RODRIGUEZ Y PAZ, RAUL CIRILO FERNANDEZ, FERNANDO ACOSTA, LUCRECIA LUM, ANNA ECHAVARRY, DULCE, ESPINOSA, CLARENCE JACKSON AND CARLOS INCHAUSTEGUI,

Defendants-Appellants,

versus

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC
(Opinion Feb. 12, 1973, 5 Cir., 1973, ____ F.2nd ____).

(March 26, 1973)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

PER CURIAM: The Petition for Rehearing filed by appellant, Fernando Acosta and adopted by appellants, Espinosa, Lum, Echavarry, Fernandez, Inchaustegui and Jackson is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.